SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1041

MICHAEL DUBINA,

Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Opinion.

The opinion of the Michigan Supreme Court shown at pages (R. 25-33) is reported at 304 Michigan Supreme Court Rep. 363; 8 N. Western (2nd) 99.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked is contained in the foregoing petition and for the sake of brevity reference is made to same as if fully incorporated herein.

Statement of the Case.

Statement of the case and the questions presented are contained in the foregoing petition and for the sake of brevity reference is made to same as if fully set forth here.

Specification of Errors.

In brief form the Michigan Supreme Court erred in holding valid a legislative act of the state of Michigan providing for a summary permanent commitment of petitioner following an acquittal on the grounds of insanity in a criminal case without a hearing prior to the commitment in violation of the due process clause of the 14th Amendment. Further specific specifications appear in the petition and are not repeated for sake of brevity.

ARGUMENT.

1. Due process requires hearing on any issue before permanent confinement of an individual.

The right of a State to provide for incarceration of an insane person is not questioned. The right of a State to restrain a person temporarily and pending a hearing is not questioned. But any commitment whether on grounds of insanity or under any pretense should be preceded with some kind of inquest and notice to the one to be detained and there should be an opportunity to defend. The fact that one has been acquitted of a criminal charge and a jury arrived at such acquittal because they believed him temporarily insane brought about by malicious acts of the deceased and at the height of a homo-sexual panic on one occasion cannot possibly dispense with our fundamental law that every person has a right to his day in court before his liberty is taken from him permanently. An acquittal by a jury of ones' peers has always meant only one thing in our system

of jurisprudence and that is the release of the person charged with crime with all of the privileges of a free man.

Due process is not limited to criminal cases. To do so would be to take one's liberty away under the guise of a civil proceeding by the use of artificial phraseology. The 14th amendment had no such intention.

> "Due process implies at least a conformity with natural and inherent principles of justice and forbids—that no one shall be condemned in his person or property without an opportunity of being heard in his own defense." Holden *v.* Hardy, 18 Sup. Ct. 383; Postal Telegraph *v.* City of Newport, 38 Sup. Ct. 566.
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> "Due process of law requires that every man shall have the protection of his day in court and the benefit of the general law which hears before it condemns and proceeds not arbitrarily but upon inquiry and renders judgment only after trial." Truax *v.* Corrigan, 42 Sup. Ct. 124.

This Court recently said in *Skinner* v. *Oklahoma*, 316 U. S. 535 on page 545,

> "A law which condemns without hearing all the individuals of a class to so harsh a measure as the present (sterilization after so many convictions) because some or even many merit condemnation is lacking in the first principle of due process * * * While the state may protect itself from the inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him before he is condemned * * * some opportunity to show that he is without such inheritable tendencies."

The dissenting opinion of Justice Gaynor in *People ex Rel. Peabody* v. *Chandler*, 25 L. R. A. ns. 946; 196 N. Y. 525 is more in reason with decisions of this Court than the pre-

vailing opinion upholding the New York law reading practically the same as the Michigan statute when he says,

> "It is not disputed that alleged lunatics may be temporarily committed without a hearing until the case can be heard in conformity with the requirement of due process of law; but they may not be committed permanently any more than alleged criminals without a hearing of a judicial nature. Citing Re: Boyett, 136 N. C. 415; 67 L. R. A. 972; Re: Lambert, 134 Cal. 626, 55 L. R. A. 856, 66 Pac., 851; State ex Rel. Blaisdell *v.* Billings, 55 Minn. 467, 57 N. W. 206 and 794; Portland *v.* Bangor, 65 Me. 120; Chase *v.* Hathaway, 14 Mass. 222; Ordway *v.* St. Saviours Sanitarium, 34 App. Div. N. Y. 363".

The language of Justice Stephens in *Barry* v. *Hall*, 98 F. (2d) 222 is particularly illuminating and is ground for belief that federal courts and this Honorable Court would not accept the Michigan and other state decisions upholding this kind of an Act. Petitioner relies heavily on this decision. So adaptable is the language quoted by the learned Justice from a Kansas decision at pg. 226 that we cannot help but repeat the same here,

> "Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere ex parte proceeding can effect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object of which was to effect the person or property of a citizen, without notice or opportunity to be heard, such legislation would be rejected and repudiated in advance as an intolerable outrage upon the rights of citizens. It would not only be a serious infringement of natural rights but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law.

"Notice and opportunity to be heard lie at the foundation of all judicial procedure. There are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law until it is established by evidence in a proper proceeding. A trial without notice—a mere ex parte proceeding—has no proper place in a court of justice. It is a nullity, and void as affecting those not parties to it."

The federal statute involved in *Barry* v. *Hall, supra* is practically identical to the Michigan Act in that the United States Treasury Department was given authority to transfer Public Health employees and others confined in the Marine hospital to a mental institution upon having some evidence in their possession that the employees had gone insane. Likewise the statute allowed a right of habeas corpus subsequent to commitment in the mental institution for the purpose of then testing sanity. Justice Stephens also specifically repudiates the state cases allowing these subsequent hearings and dispensing with hearings before commitment. After citing several state cases the Justice says on page 228,

"The statutes involved in these cases were lunacy statutes. They did not require notice and opportunity to be heard in advance of commitment and confinement, but did afford a hearing later at the instance of the subject, in the Dowdell Case by special statutory

proceeding, and in the other cases by the writ of habeas corpus. The provisions for ultimate hearing were held to save the statutes. We think the cases are wrongly decided."

State courts are more likely to uphold the constitutionality of a law of their own state claimed to be repugnant to the Federal Constitution than will the federal courts and this Honorable Court. It is the general statement of text writers and compilers that notwithstanding the ability and integrity of the State Tribunals such is the frailty of our nature that, without being aware of it, their judgments have been influenced to maintain the legislation of their respective states, and in almost every instance in which this Court has held a state law to be unconstitutional the same law was held valid by the unanimous decision of the state judiciary.

While the rule in this Court is that there is a reasonable presumption in favor of an Act the same is rebuttable.

Home Telegraph v. *Los Angeles*, 211 U. S. 265;
Sweet v. *Rechel*, 159 U. S. 380;
Sinking Fund Cases, 99 U. S. 700;
Borden v. *Baldwin*, 293 U. S. 194.

State courts follow almost literally a rule that the Act will be valid unless it is so noxious as to be shocking and revolting to the conscience. One rule adopted by the Michigan court appears in the opinion (R. 28). Therefore it is logical to assume that the court adopted the theory that since a hearing was provided somewhere along the way the due process requirement of a hearing had probably been met or at least was debatable. But as was said in *Skinner* v. *Oklahoma, supra.*

"There are limits to the extent to which the presumption of constitutionality can be pressed, especially

> where the liberty of the person is concerned and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action."

To say that by dint of some relief which may be secured in years to come satisfies due process is to miss the purpose of that safeguard with all due respect to judicial opinion which suggest the thing.

(2) The issue of insanity on a criminal charge is purely collateral.

The issue of insanity on the trial was only whether the petitioner was insane at the time of committing an offense and that is all that the verdict could establish. He was not in the situation of being tried at the same time on an issue of his present sanity before the judge and of his past sanity before the jury. The whole subject of temporary insanity was purely collateral. It could not be charged in the information by the state along with a charge of crime. It is elementary that the crime of murder must have intent; and that lack of intent is the gist of an insanity plea. In *Brown* v. *Urquhart,* 139 Fed. 846 the federal circuit court stresses this point in holding invalid as lacking in due process the Washington State Act which in substance is the same as the Michigan Act. The Court said in its opinion,

> "The verdict is a conclusive determination of the only question submitted to the jury, viz; whether defendant is guilty or not guilty of the crime charged; and being purged of criminality, the power of the court in which he was tried to imprison him depended entirely upon facts and conditions existing subsequent to the acquittal which necessarily could not have been comprehended in the verdict."

(3) Right to prove sanity after permanent confinement is no substitute for an original hearing.

To confine a person permanently without hearing is almost without precedent and has no precedent in this Honorable Court. Later relief on a writ of habeas corpus to test sanity may never be accorded. It is common knowledge that institutional authorities may be and often are capricious and arbitrary. The slightest off-color conduct of an individual when he is at their command every hour of the day and night over a period of years may be built from a mole hill to a mountain. What chance does the individual have with the onus upon him in a subsequent hearing under such circumstances. While due process vests no rights in a rule of law it is more than a rule which arbitrarily confines and places the burden of proof upon one to show he is not guilty. Cruel and unusual punishment could be easily argued under Article VIII if Congress had enacted such a statute. This changes our whole concept of law. It has been our rule that an accused person need not even take the witness stand, that it was up to the goverment or the state to prove him guilty or establish insanity if incarceration is desired. A defendant who enters a plea of temporary insanity is immediately confronted with confinement for life whether he is found guilty or not. Particularly pertinent is the language of this Court in *McFarland* v. *American Sugar Co.*, 241 U. S. 79, where it was said,

> "The legislature may go a good way in raising a presumption or in changing the burden of proof but there are limits * * * It is not within the province of the legislature to declare an individual guilty of crime."

With equal force the opinion might also have continued that the legislature cannot declare a person summarily disposed to life imprisonment upon entering a plea of tempo-

rary insanity in a criminal case. Where due process is involved it is immaterial whether confinement is tied in with crime. The principal thing is the incarceration and the deprivation of liberty.

It is submitted that the foregoing both in this brief and the petition involve a substantial question which ought to be reviewed by this Court. It is well established that review by this Court will not be denied for want of a substantial federal question unless the contentions of the appellant are clearly debatable and utterly lacking in merit. *Hamilton* v. *Regents of U. of California*, 293 U. S. 245, 258; 79 L. Ed. 343, 350.

Conclusion.

It is therefore respectfully submitted that the case is one calling for the exercise by this Court of its power to issue its writ of certiorari; that petitioner may not be deprived of the rights guaranteed him by the 14th amendment, and that to such end a writ of certiorari be granted directed to the Supreme Court of the State of Michigan and this Honorable Court review the decision aforesaid and finally reverse it.

JAMES B. STANLEY,
Attorney for Petitioner.

HARRY C. HOWARD,
Of Counsel.

Dated at Kalamazoo, Michigan, this 18th day of May, 1943.

STATE OF MICHIGAN,
County of Kalamazoo, ss:

James B. Stanley, being duly sworn, deposes and says that on the 18th day of May, 1943 he enclosed a true copy of the attached petition and brief and accompanying record

in an envelope addressed to the Attorney General of the State of Michigan at Lansing, Michigan and after placing proper postage thereon and sealing same he deposited said matter in a regular United States Postal box in the city of Kalamazoo, Michigan.

JAMES B. STANLEY,

Subscribed and sworn to before me this 18 day of May, 1943.

ELLA H. BARSTOW,
Notary Public, said county and state.

My Commission expires Aug. 2, 1946.

(6276)